ALTHOUGH THE CRITICISMS of *Roe* were relatively muted at the time of the decision, this began to change over the course of the next decade. Indeed, over time Roe would come to be seen as perhaps the most polarizing issue in American politics. For those Americans who believe that abortion is immoral or worse, murder. The idea that Roe "ended" the debate was simply unacceptable. They would not sit quietly and allow the nation to slaughter millions of innocent children. Resistance was necessary. With this understanding, some commentators have assumed that the fierce political polarization we have seen over the abortion issue was an inevitable consequence of Roe.

Other commentators maintain, though, that it was not Roe itself that triggered this backlash, but a calculated campaign by Republican Party operatives to exploit Roe for partisan political gain. These commentators point out that political strategists in the late 1970s leveraged Roe as part of a carefully crafted campaign to energize evangelicals and to bring them into the Republican Party. In their view, the centrality of Roe in American politics was not an inevitable consequence of the decision, but the result of a strategic campaign to turn Roe into a divisive and a highly emotional political symbol, along with the issues of pornography, homosexuality, and women's rights, in what would come to be known as the "Culture Wars." 21

Whatever the cause or combination of causes there is no doubt that in the decades since Roe was decided controversy over the decision has played a critica1 ro1e in American politics, in the nomination and confirmation of Supreme Court justices, and in the continued evolution of American constitutional law.

RISE OF THE CHRISTIAN RIGHT

FOLLOWING THE LEAD of their forebears during the Second Great Awakening, Protestant fundamentalists remained active in American politics throughout the twentieth century. Alarmed by the widespread teaching of evolution (exemplified by the Scopes "monkey trial" in 1925), the rise of Catholics as a national political force (exemplified by the Democratic Party's nomination of a Catholic, Al Smith, for the presidency in 1928), and rapidly changing sexual mores and gender roles in the l920s, evangelical Christians sought to reclaim the nation's institutions and to "make them a force for Protestantism and public morality." Despite their fervor, though, they had little impact on national politics because neither of the two major political parties was all that interested in their demands.

By midcentury, however, Protestant fundamentalists began increasingly to identify with the Republican Party as the party most likely to embrace a "Protestantbased moral order." In 1960, Southern Baptists, northern evangelicals, and independent fundamentalists came together in a rare moment of unity to try to prevent a Catholic John F. Kennedyfrom being elected president. It was only in the late 1960s, however, that Protestant fundamentalists began to influence the Republican agenda. By focusing on the emerging struggle over evolving gender roles and sexual and reproductive morals, and by presenting a united front in their campaign to attain meaningful political influence, what came to be known as the "Christian Right" aligned itself with the Republican Party in a concerted effort to resist what they perceived as the growing threat to American culture posed by "feminism, abortion, pornography, and gay rights."[3]

Opposition to the Equal Rights Amendment was a crystallizing force. In the 1960s, evangelicals worried about what they perceived as the disintegration of the American family. The divorce rate had doubled, outofwedlock births had increased, young people were now living openly together in sin, and the media increasingly suggested in movies, magazines, and television that single career women like Mary Richards of the Mary Tyler Moore Show could have satisfying sex lives. As the Rev. Billy Graham warned, the nation was facing "an assault on marriage such as man has never known." If that assault was not halted, he railed, America would be "finished." 4

Evangelicals blamed the feminist movement, in particular, for what they saw as the demise of the American family. Feminists had already made important strides in the 1960s with the publication of Betty Friedan's *The Feminine Mystique* in 1963; the passage of Title VII of the Civil Rights Act

of 1964, which for the first time prohibited employment discrimination against women; and the founding of the National Organization for Women in 1966. Six years later, the Equal Rights Amendment, which provided that "equality of rights under the law shall not be denied or abridged the United States or any state on account of sex," passed both Houses Congress by overwhelming majorities. At that time, the ERA was enthusiastically endorsed by Republicans and Democrats alike. Supporters anticipated quick ratification by the thirtyeight states necessary to approve the amendment.[5]

It was not to be. The ERA ignited an unexpected and furious response from social conservativesincluding many socially conservative womenwho saw the ERA as an assault on their "notions of femininity" and on what they regarded as the necessity of "separate spheres" for women and men. Socially conservative women did not want to be "equal" to men. They wanted to preserve what they firmly believed to be "Godgiven gender differences." Almost immediately after the ERA was approved by Congress, evangelicals denounced the proposed amendment as "an affront to God."

The individual who most effectively led the charge against the ERA was Phyllis Schlafly, a fiercely conservative lawyer, activist, author, and speaker who founded STOP ERA. By characterizing the ERA as a symbol of rampant feminism, Schlafly "transformed the debate over the amendment into a national referendum on 'women's lib.'" Her opposition to the ERA was more than politicalit was holy. When Schlafly, who fervently believed that she had God at her back, declared that her campaign against the ERA was a "heavenly cause," she was in earnest.

Meanwhile, Beverly LaHaye, a leading evangelical voice in the antiERA movement, proclaimed that the "woman who is truly Spiritfilled will want to be totally submissive to her husband." She founded Concerned Women for America to "promote Biblical values for women and familiesfirst through prayer, then education, and finally by influencing our elected leaders and society." She challenged her followersthose "truly committed to Jesus Christ"to "wage warfare against those who would destroy our children, our families, our religious liberties."

The antiERA campaign brought together a broad array of previously divided Catholics, Mormons, Baptists, and Protestant evangelicals. In a few short years, the antiERA campaign swept into its fold millions of citizens who fervently opposed homosexuality, abortion, obscenity, and sexual license in a nationwide movement committed to restoring "family values."

they thought abortion a moral wrong, but also because they saw abortion as a direct threat to traditional social and family relationships. Claiming to represent true American values and invoking the mantle of the United States as a "Christian nation," these advocates took a vehement stance on social issues and insisted more vigorously than any prior social or political movement in American history that life begins at conception.

As Republican Party strategist Richard Viguerie observed after the successful campaign in 1977 to repeal the Dade County, Florida, ordinance forbidding discrimination against gays and lesbians; family issues were the engine propelling the rise of the Christian Right. "Conservatives can win," he declared, when they fight for "traditional family values." This movement brought Protestant fundamentalism back into American politics in a way that had not been seen since the Second Great Awakening.[6]

BEFORE THE 1970s, no one would have associated the Republican Party with opposition to abortion. Republican politicians had spearheaded some of the earliest efforts to liberalize abortion laws in California, Colorado, and New York; Barry Goldwater, one of the party's conservative icons and its 1964 presidential candidate, had supported abortion rights; and in 1967, California Governor Ronald Reagan signed a bill liberalizing that state's abortion laws. But as the antiERA movement energized the Christian Right, and as the focus expanded from the ERA to issues of sexuality, reproduction, obscenity, homosexuality, and abortion, Republican Party strategists saw a unique opportunity to bring a critical voting bloc into the fold.

The potential political gain was enormous. By the mid1970s, polls showed that more than a third of all Americans selfidentified as "born again." Evangelicals had become the nation's largest religious demographic. Christian bookstores sold millions of copies of books by James Dobson, Tim and Beverly LaHaye, and Billy Graham, and more than sixty nationally syndicated religious broadcasters, along with many more local TV preachers, filled the airwaves with evangelical messages. Influenced by its growing connection to the Christian Right, the Republican Party increasingly embraced the "right to life" as a central tenet of its program.[7]

When the Rev. Jerry Falwell, an evangelical Southern Baptist pastor, televangelist, and conservative political commentator, founded the Moral

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* See chapter 11.

Falwell's "masterful use of publicity gained him access to corridors of power that other Christian Right activists had never dreamed of entering." By the summer of 1980, Republican Party leaders were treating Falwell, more than any other religious figure in American history, like the leader of a powerful political constituency.9

Evangelicals now realized that for the first time in more than a century they had "the voting power and the financial resources to change national politics." Christian broadcaster Pat Robertson, who railed that "the feminist agenda" was "a socialist, antifamily, political movement that encourages women to leave their husbands, kill their children, practice witchcraft, destroy capitalism, and become lesbians," boasted that the evangelical community now had "enough votes to run the country." Evangelical leaders were increasingly confident that conservative Christians were now in a position to compel the Republican Party to embrace their positions on obscenity, abortion, gay rights, and the ERA. They were now, in their view, the true "moral majority."10

In 1980, in his pursuit of the presidency, Ronald Reagan condemned abortion as immoral and advocated a constitutional amendment to overturn *Roe.* For the first time, the issue of abortion sharply divided the Republican and Democratic parties, and Reagan, despite his Hollywood roots, officially allied himself with the Christian Right. In August of 1980, he journeyed to Dallas to address fifteen thousand evangelical leaders who had gathered at the Religious Roundtable's National Affairs Briefing. The Christian Right viewed this event "as the beginning of a longterm alliance." The leaders of the Christian Right determined then and there that electing Ronald Reagan president was the key to getting the federal government to curb abortion rights, put women back in their place, roll back the gay rights movement, and "lead the nation back to morality."[11]

As part of this bargain, the Republican Party platform of 1980 promised the appointment of prolife, socially conservative judges at all levels of the judiciary, thus ushering in a historic era of judicial nominations shaped m no small part by religious conceptions of constitutional law. Jerry Falwell called the 1980 Republican Party platform a "dream platform" that "could easily be the constitutional of a fundamentalist Baptist Church."

Abandoning any pretense of nonpartisanship, evangelical leaders for the first time in American history began to coordinate their activities in a concerted effort to elect a designated candidate for president. In the 1980 election, priests and pastors expressly endorsed " prolife" candidates across the nation and the evangelical *Christian Voice* magazine issued a "moral report card" rating congressional candidates on abortion and other moral

issues. Politicians across the nation suddenly realized that their position on *Roe* could well determine their political futures.

Jerry Falwell declared Ronald Reagan's election in November greatest event for the cause of "morality in my adult life " and in 1980 James Dobson, the founder of Focus on the Family, proclaimed that evangelicals had finally "come home" and that "home was the White House."12

RESISTING ROE

AS THE OPPOSITION to Roe crystalized and became more focused and energized, several responses to Roe emerged. The first, and most obvious was to enact a constitutional amendment to overturn the decision. eight days after the Court announced its decision in Roe, Catholic members of Congress began introducing what came to be known as "human life amendments. These proposed constitutional amendments provided, in one form or another, that nothing in the Constitution should be understood to limit the authority of the state and federal governments to regulate or prohibit abortion.

These proposals attempted to recast abortion, not as a fundamental right of the woman, but as the murder of unborn children. The Catholic Church established the National Right to Life Committee, which enlisted priests to recruit supporters, raise money, and promote a popular movement to amend the Constitution.13 In the mid1970s, fifty different right to life amendments were put before Congress, but to no avail. None garnered the votes necessary to move the process forward. Frustrated, but undaunted, the prolife forces next turned to the political process in an effort to elect more members of Congress who would support a human life amendment.14 At the end of the decade, with the founding of the Moral Majority, Protestant evangelicals, who in the past had divided on the issue of abortion, now joined forces with Catholics in their demand for a human life amendment. In an effort to court the Catholic and evangelical vote in the 1982 midterm election, President Reagan promised that he would "not rest until a human life amendment becomes part of our Constitution."

In the 1984 election, Christian Right leaders dropped all pretense of nonpartisanship and mounted an unprecedented effort to achieve the necessary majority in Congress, went all out for the Republican Party. Eighty percent

• See chapter 16.

cent of evangelicals voted for Republican candidates up and down the line. This represented a profound and historical shift in the American political landscape. Only a decade earlier, a majority of evangelicals had supported the Democratic Party. But despite their passion, their commitment, their resources, and the certainty of their convictions, even the Catholic Church and the Moral Majority *combined* could not muster enough votes to achieve the twothirds majority that was necessary to get a human life amendment through Congress.[15]

A SECOND response to *Roe,* born out of outrage and frustration, was resort to obstruction and violence. Some antiabortion activists directly interfered with the operation of abortion clinics by blocking entrances, harassing women who sought to enter, and publishing the names of women who obtained abortions. Others went further.16

In 1980, Joseph Scheidler founded the ProLife Action League, a national organization dedicated to confronting "abortionists" and their supporters. The Action League picketed abortion clinics, prochoice organizations, and the homes of both those who performed legal abortions and those who had them. Scheidler's supporters jammed clinic telephone lines so patients could not make appointments and scheduled fraudulent appointments to overwhelm the schedules of abortion providers.[17]

Another tactic used by abortion opponents was to establish fraudulent abortion clinics, which advertised aggressively in an effort to lure in women seeking to exercise their right to terminate an unwanted pregnancy. The unsuspecting women were then greeted with harsh antiabortion messages, shown gruesome slides of aborted fetuses, and given dire warnings about the supposed medical consequences of abortion. By 1988, there were between 800 and 2 000 fraudulent abortion clinics in the United States, and they managed to draw inand to intimidatealmost halfamillion women annually.18

The anger generated by legal abortions triggered even more extreme responses. In 1978, a Cleveland clinic was firebombed, an act that elicited cheers from several antiabortions organizations on the ground that violence was a necessary and morally appropriate response to the slaughter of unborn children. Antiabortion violence soared in the midl980s, in part as a result of increasing frustration over the lack of progress on the political front. In 1984 alone there were 161 acts of violence against abortion clinics and twentyone reported death threats against medical and other Personnel,19

In 1986, the antiabortion activist Randall Terry founded Operation Rescue, an organization dedicated to the proposition that "if you believe abortion is murder, act like it's murder." Doctors and other employees of abortion clinics were increasingly subjected to threats, harassment and violence. In 1993, for example, Michael Griffin, a right to life activist, shot and killed a forty seven year old physician, Dr. David Gunn, because he had performed legal abortions in Florida. Prolife extremists applauded Griffin's act, proclaiming that by murdering Dr. Gunn, Griffin had saved the lives of many as yet unborn babies.

In part as a consequence of this violence, fewer and fewer doctors and hospitals were willing to perform abortions, making it ever more difficult for women to exercise their right to terminte unwanted pregnancies. By the mid199Os, the number of doctors receiving abortion training in medical schools and residency programs had decreased dramatically; 84 percent of all counties in the United States; and 95 percent of all rural counties, had no abortion providers; and there were six hundred fewer hospitals offering abortion services than twenty years earlier.[20]

But despite these efforts, the core right recognized by the Court in *Roe* remained intact, and almost a million women each year still managed to have safe and *legal* abortions. Violence was not enough to stem the tide.

THE THIRD response to *Roe* was legal regulation. *Roe* did not prohibit all regulation of abortion. Although the Court held in *Roe* that the state cannot constitutionally interfere with a woman's decision to terminate a pregnancy during the first trimester, it also held that in the second trimester, as the possible health risks to the woman increase, the state can reasonably regulate the abortion procedure in order to protect the woman's health. Moreover, at the beginning of the third trimester, after the fetus is viable, the Court held that the state could constitutionally prohibit abortion, unless the procedure was necessary to preserve the life or health of the woman. Although this structure seems reasonably clear, much was left unresolved.

In the years since *Roe,* the federal and state governments have enacted hundreds, if not thousands, of laws testing the limits of this structure. Some of these laws reflect good faith efforts to exercise the authority left open by the Court to regulate abortion for appropriate reasons in the second and third trimesters. Others, however, were clearly designed to push the envelope and to see just how far the Court would push back.

Not surprisingly, the aggressiveness of these regulations has varied from

state to state, depending largely on the political and religious makeup of the community. In states that are predominantly Republican or have large Catholic or evangelical populations, the efforts to restrict abortion have often been quite aggressive. Indeed, in many instances the legislative attitude was, in effect, "We *dare* you to hold this unconstitutional!"21

Thus, in the years since *Roe,* the state and federal governments have enacted a broad range of restrictions on the circumstances in which a woman can terminate an unwanted pregnancy. Illustrative restrictions include laws requiring first trimester abortions to be performed by a licensed physician, prohibiting any advertisement for abortion services, requiring a woman to wait several days before having an abortion, prohibiting a woman to have an abortion without first obtaining the father's consent, prohibiting a minor to have an abortion without first obtaining parental consent, requiring facilities that perform abortions to have all the features of ambulatory surgical centers, and prohibiting "partialbirth" abortions even when necessary to protect the life or health of the woman.22

These and similar laws have kept the Supreme Court very busy, indeed.

THE FOURTH response to Roe focused on the makeup of the Supreme Court itself who, in short, would get the last word on the constitutionality of such laws? Roe raised the stakes dramatically in the Supreme Court nomination and confirmation process. Indeed, ever since the 1980 Republican Party platform promised the appointment of judges who respect "the sanctity of innocent human life," the question "What is your view of Roe?" has played a central role in both the president's choice of Supreme Court nominees and the often bitter struggles in the Senate over confirmation. If the antiabortion movement could not muster the votes needed to overturn Roe by constitutional amendment, then perhaps it could achieve the same result by transforming the Court and thus getting the decision narrowed or even overruled.

REFINING ROE

IN THE YEARS after *Roe,* the Supreme Court took a generally firm stance in defense of the right of a woman to terminate an unwanted pregnancy. Thus, in a series of decisions between 1973 and 1990, the Court, often over sharply worded dissents, invalidated laws requiring a woman's husband to give prior written consent before she could obtain an abortion; requiring